

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

SKYMARK FINANCE CORPORATION

Applicant

and

MAHAL VENTURE CAPITAL INC. and GOLDEN MILES FOOD
CORPORATION

Respondents

**FACTUM OF MNP LTD.,
IN ITS CAPACITY AS THE RECEIVER OF THE PURCHASER,
12175622 CANADA LTD.**

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Canada Inc. and GPM Food Inc.

TO: **THE SERVICE LIST**

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FACTUM OF MNP LTD.

PART I. OVERVIEW

1. This Factum is filed on behalf of MNP Ltd. in its capacity as receiver and manager of the purchaser of the business assets of the Respondents Mahal Ventures et al. The Factum is filed in respect of the Receiver's motion for an order that the Receiver, KSV Restructuring Inc. ("**KSV**"), is not liable or otherwise obligated to pay 12175622 Canada Ltd. ("**121**") or the City of Brantford (the "**City**") on account of the Omit Tax Claims (as defined below).
2. Under both the Asset Purchase Agreement ("**APA**") and the Approval and Vesting Order ("**AVO**"), the Receiver is liable for the Omit Tax Claims and they should be paid out of the proceeds of the sale of the property of the Respondents and in particular the monies held back for that purpose.
3. The Omit Tax Claims were a liability known to the Receiver at the time the parties entered into the APA and when the Court granted the AVO in these receivership proceedings. However, despite the Receiver having knowledge prior to closing the Transaction (as defined below) on May 18, 2022 of the need for a reassessment of the Lands for the 2019, 2020 and 2021 years, which all pre-date the close of the Transaction, the Receiver chose not to notify prospective purchasers of the tax liability or carve out the liability as a Permitted Encumbrance under the AVO, which would have caused a purchase price effect. The Receiver cannot now claim that the liability arose post-closing, that 121 assumed liability of the Omit Tax Claims under the APA, or that 121 had notice of the Omit Tax Claims.

4. Additionally, 121 purchased the assets on the basis that they would be conveyed free and clear of any claims or encumbrances and Farm Credit Canada financed this transaction in reliance on the purchased assets being free of encumbrances. The AVO properly vests out the Omit Tax Claims as a liability of 121 as Purchaser and the Omit Tax Claims are to be asserted against the proceeds of the Transaction held by Receiver, not 121 or its acquired assets.

PART II. SUMMARY OF FACTS

5. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the KSV Factum.

The Transaction

6. 121, as purchaser, entered into an APA dated March 18, 2022 to purchase substantially all of the assets, undertakings and property ("**Property**") of the Respondents in these proceedings (the "**Mahal VC Receivership**"), including the real property located at 155 Adams Boulevard, Brantford, Ontario (the "**Transaction**").¹
7. FCC provided the financing for the Transaction.²
8. On April 11, 2022, KSV brought a motion to approve the Transaction and obtained an approval and vesting order with respect to the Transaction (the "**AVO**"), which conveyed the Property, including the real property located at 155

¹ Affidavit of Dale Snider affirmed April 25, 2024 (the "**Snider Affidavit**") at [paras 4-5](#), Responding Motion Record of MNP Ltd., Tab 1.

² Snider Affidavit at [para 6](#).

Adams Boulevard (the “**Lands**”), to 121 free and clear of all claims and encumbrances.³

9. The City was given notice of the AVO motion and did not oppose the motion.⁴
10. “Assumed Liabilities” was defined in the APA as follows:⁵

“Assumed Liabilities” means the following Liabilities of each of the Debtors:

(a) all Liabilities under the Assigned Contracts and Permits and Licences (in each case to the extent such Assigned Contract or Permit and Licence is effectively assigned to the Purchaser);

(b) all Liabilities relating to the Purchased Assets or Related to the Business arising on or after the Closing Date;

(c) all Liabilities on account of the trade accounts, payables and other current accounts payable, in each case incurred or accrued by any of the Debtors on or after the Closing Date in the ordinary course of business and Related to the Business; and

(d) all Environmental Claims and all Environmental Liabilities. [All emphasis added.]

11. Paragraph 4 of the AVO provided:⁶

4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver’s certificate to the Purchaser substantially in the form attached as Schedule “A” hereto (the “Receiver’s Certificate”), **all of the Receiver’s and the Companies’ right, title and interest in and to the Purchased Assets described in the APA shall vest absolutely in the Purchaser, free and clear** of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and

³ Snider Affidavit at [para 7](#).

⁴ Snider Affidavit at [para 8](#).

⁵ Sixth Report of KSV dated March 26, 2024 (the “**Sixth Report of KSV**”) at [page 118](#), APA, article 1.1, Motion Record of the Receiver, Tab 2.

⁶ Sixth Report of KSV at [page 160](#), AVO at para 4; [page 168](#), AVO at Schedule “C”.

whether secured, unsecured or otherwise (collectively, the "Claims") **including, without limiting the generality of the foregoing:** (i) any encumbrances or charges created by the Order of the Honourable Justice McEwen dated October 1, 2021; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Ontario) or any other personal property registry system; and (iii) **those Claims listed on Schedule "B" hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "C")** and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets and are non-enforceable and non-binding as against the Purchaser.

...

Schedule C – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)

(a) Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested; [All emphasis added.]

12. In advance of the close of the Transaction, the City issued a tax certificate in respect of the Lands dated March 21, 2022 (the "**2022 Tax Certificate**").⁷ The 2022 Tax Certificate did not include the amounts constituting the Omit Tax Claims.
13. The Transaction closed on May 18, 2022.⁸
14. KSV paid the full amount of the 2022 Tax Certificate on May 25, 2022.⁹

⁷ Snider Affidavit at [para 9](#).

⁸ Snider Affidavit at [para 10](#).

⁹ Snider Affidavit at [para 11](#).

The Omit Tax Claims

15. Unbeknownst to 121, on October 1, 2021, the City gave notice to KSV that the Lands would need to be reassessed and that omitted tax notices would be issued after MPAC properly assessed the Lands.¹⁰
16. KSV had ongoing communications with the City throughout 2021 until the close of the Transaction, including receiving updates from the City that the property had not yet been properly assessed.¹¹
17. 121 was not notified of these discussions prior to or after the close of the Transaction.¹²
18. On May 19, 2022, following the close of the Transaction, KSV wrote to the City to advise that all future tax bills should be directed to 121.¹³ The letter makes no reference to the previously identified reassessment. 121 was not copied on this correspondence.
19. On November 1, 2022, the City delivered a tax assessment to 121 (the “**2023 Tax Certificate**”), which included three “omit” tax bills for 2020, 2021, and 2022 totalling \$1,091,423 (the “**Omit Tax Claims**”).¹⁴

¹⁰ Affidavit of Pat Telfer affirmed May 2, 2024 (the “**Telfer Affidavit**”) at [para 5](#), Responding Motion Record of the City of Brantford, Tab 1.

¹¹ Telfer Affidavit at [para 5](#).

¹² KSV Factum at [paras 53-56](#).

¹³ Telfer Affidavit at [para 14](#).

¹⁴ Telfer Affidavit at [para 17](#).

20. On February 23, 2023, the Purchaser notified the Receiver of the 2023 Tax Certificate.¹⁵
21. On June 1, 2023, FCC obtained the 2023 Tax Certificate.¹⁶
22. Prior to receiving the 2023 Tax Certificate, 121 and FCC did not have any notice of potential tax claims other than those addressed in the 2022 Tax Certificate.¹⁷
23. FCC advanced funds for the Transaction on its specific reliance that the Lands were being conveyed free and clear of any claims or encumbrances, and based on the 2022 Tax Certificate. FCC would not have agreed to advance funds for the Transaction if it was aware the Omit Tax Claims were a continued liability as against the Purchaser and the Lands.¹⁸

The GPM Receivership

24. FCC brought an application on January 18, 2024 to appoint MNP Ltd. as receiver and manager, without security, over all assets, undertakings and properties of 121 and a related entity, GPM Food Inc., (collectively, “**GPM**”) acquired for, or used in relation to a business carried on by GPM, which includes the Lands (the “**GPM Receivership**”). The Court granted the relief sought by Order of Justice Krawchenko dated January 18, 2024¹⁹ and the Receivership is ongoing.

¹⁵ Fifth Report of KSV dated August 15, 2023 at [para 9.0\(1\)](#), Motion Record of the Receiver, Tab 2(A).

¹⁶ Snider Affidavit at [para 12](#).

¹⁷ Snider Affidavit at [para 13](#).

¹⁸ Snider Affidavit at [para 15](#).

¹⁹ Snider Affidavit at [para 16](#).

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

25. The issue to be determined by the Court is who, among KSV, 121 as Purchaser, or the City is liable for the Omit Tax Claims?

Omit Tax Claims arose Pre-Closing

26. The Omit Tax Claims clearly arose prior to the close of the Transaction. The Receiver admits that the liability relates to the construction of a flour mill in 2016 and the reassessment of tax liabilities that arose in 2019, 2020 and 2021, prior to the Transaction, in relation to that construction.²⁰
27. The fact that the quantum of the liability was not assessed until after the close of the Transaction does not impact when the liability arose.
28. Additionally, section 307(3) of the *Municipal Act, 2001* deems that taxes assessed under the *Assessment Act*, as in this case, are deemed to have been imposed and to be due on January 1 of the year to which they relate unless the by-law imposing the tax provides otherwise.²¹ There is no evidence that there is a City by-law providing otherwise. As a result, the reassessed amounts that make up the Omit Tax Claims are deemed to be imposed and due on January 1, 2019, January 1, 2020, and January 1, 2021.

²⁰ KSV Factum at [para 55](#).

²¹ *Municipal Act, 2001*, SO 2001, c 25, [s 307\(3\)](#).

Receiver Chose Not to Disclose the Tax Liability

29. Contrary to the Receiver's position,²² the Receiver did not disclose the possibility of reassessment to the Purchaser.
30. The Receiver had notice of the need for the reassessment and that tax liability could flow from the reassessment well in advance of closing (more than four months prior to closing), but it chose not to disclose that information to prospective purchasers.
31. The Purchaser cannot now be held responsible for a liability that was known prior to closing, relating to tax liabilities arising prior to the Transaction, and that the Receiver chose not to disclose to potential purchasers.

Omit Tax Claims are Not Assumed Liabilities under the APA

32. The Omit Tax Claims are not Assumed Liabilities under the APA. The Purchaser is only responsible for "Liabilities relating to the Purchased Assets or Related to the Business arising **on or after the Closing Date**".²³ As set out above, the Omit Tax Claims arose prior to the close of the Transaction.
33. 121 is not liable for the Omit Tax Claims as an Assumed Liability under the APA.

²² KSV Factum at [paras 53-57](#). See especially [paras 56-57](#).

²³ Sixth Report of KSV at [page 118](#), APA, article 1.1. [Emphasis added.]

Omit Tax Claims are Not Subject to an Adjustment under the APA

34. The Omit Tax Claims were an existing claim prior to the close of the Transaction and therefore not one that could be the subject of an adjustment claim.
35. It strains credibility to suggest that the Omit Tax Claims should have been the subject of a purchase price adjustment that 121 lost out on because the claim was not asserted within the 45-day adjustment window, as the quantum of such an adjustment claim could not have been known within the permitted time period. The Omit Tax Claims were not disclosed until November 1, 2022, long past 45 days from Closing.

Approval and Vesting Order Conveyed the Lands Free and Clear of Encumbrances

36. Purchasers in the context of receiverships must be able to rely on Vesting Orders or the modern insolvency regime would crumble.²⁴
37. The Court in *Grant Thornton v 190* confirmed that one of the purposes of an AVO is to allow a debtor's asset to be sold at the highest price. If eventual claims for taxes were known to prospective purchasers, they would no doubt have offered a lower price.²⁵
38. 121 (and FCC) did not have notice of the Omit Tax Claims, despite KSV being aware prior to closing of the need for a reassessment.

²⁴ *Grant Thornton Limited et al v. 1902408 Ontario Ltd.*, [2022 ONSC 2011](#) at [para 49](#) [*Grant Thornton v 190*].

²⁵ *Grant Thornton Limited et al v. 1902408 Ontario Ltd.*, 2022 ONSC 2011 at [para 51](#), citing *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2016 QCCS 5620](#), aff'd 2017 QCCA 15.

39. FCC advanced funds for the Transaction on the specific reliance that the Lands were being conveyed free and clear of any claims or encumbrances. FCC would not have agreed to advance funds for the Transaction if it was aware that the Omit Tax Claims were a continued liability as against the Purchaser and the Lands.²⁶
40. Moreover, the AVO vests out the Omit Tax Claims. The Ontario Court of Appeal addressed the question of whether reassessed tax claims were the responsibility of the Receiver in *Credit Union Central*.²⁷ In *Credit Union Central*, the Court was similarly faced with a sale transaction in the context of a Receivership where the court had granted an Approval and Vesting Order and, following that, the Purchaser learned that MPAC intended to reassess the property and the reassessment would result in a substantial increase in realty taxes.²⁸ The Ontario Court of Appeal held that the Receiver must bear responsibility for the increased taxes up to the date of closing that flowed from the reassessment.²⁹
41. The Omit Tax Claims existed prior to closing and it is clear that the purpose of paragraph 4 of the AVO was to convey the Lands free and clear of encumbrances. The vesting paragraph should be read broadly and with the parties' intentions in mind.³⁰ The carve out of "Permitted Encumbrances" in

²⁶ Snider Affidavit at [para 15](#).

²⁷ *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.*, [2008 ONCA 167](#) [*Credit Union Central*].

²⁸ *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.*, 2008 ONCA 167 at [paras 2-3](#).

²⁹ *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.*, 2008 ONCA 167 at [para 30](#).

³⁰ *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.*, 2008 ONCA 167 at [para 29](#).

Schedule "C" does not include "any potential liability for increased prior year taxes as a result of reassessment". The Receiver could have included such a statement if it had wanted to, as it was the only party with knowledge of the likelihood of such a reassessment. It chose not to.

42. The Receiver must bear the responsibility for the Omit Tax Claims.

Omit Tax Claims are an Unsecured Claim in the GPM Receivership

43. In the alternative, if the Purchaser is liable for the Omit Tax Claims, they are an unsecured claim in the GPM Receivership, which ranks behind the secured claims of FCC. It is anticipated there will be a shortfall in the GPM Receivership such that there will likely be no recovery for unsecured creditors.

PART IV. ORDER REQUESTED

44. For the reasons set out above, MNP requests that the Court determine KSV as Receiver is liable for the Omit Tax Claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of May, 2024.



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SCHEDULE “A”
LIST OF AUTHORITIES

Jurisprudence

1. *Credit Union Central of Ontario Limited v Heritage Property Holdings Inc.*, [2008 ONCA 167](#)
2. *Grant Thornton Limited et al v. 1902408 Ontario Ltd.*, [2022 ONSC 2011](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

[Municipal Act, 2001, SO 2001 c 25](#)

Taxes to be levied equally

307 (1) All taxes shall, unless expressly provided otherwise, be levied upon the whole of the assessment for real property or other assessments made under the Assessment Act according to the amounts assessed and not upon one or more kinds of property or assessment or in different proportions. 2001, c. 25, s. 307 (1).

Tax ratios

(2) If, in this or any other Act or any by-law passed under any Act, taxes, fees or charges are expressly or in effect directed or authorized to be levied upon rateable property of a municipality for municipal purposes, unless expressly provided otherwise,

(a) such taxes, fees or charges shall be calculated as percentages of the assessment for real property in each property class; and

(b) the tax rates and the rates to raise the fees or charges shall be in the same proportion to each other as the tax ratios established under section 308 for the property classes are to each other. 2001, c. 25, s. 307 (2).

Deemed imposition

(3) Taxes imposed for a year shall be deemed to have been imposed and to be due on January 1 of the year unless the by-law imposing the tax provides otherwise. 2001, c. 25, s. 307 (3).

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Applicant

Court File No. CV-21-00664778-00CL
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PROCEEDING COMMENCED AT
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